Nos. 78-1562 and 78-1724

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITRONELLE-MOBILE GATHERING, INC., PETITIONER

v.

GULF OIL CORPORATION AND
DEPARTMENT OF ENERGY

CITRONELLE-MOBILE GATHERING, INC., PETITIONER

v.

GULF OIL CORPORATION AND
DEPARTMENT OF ENERGY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
STEPHANIE LACHMAN GOLDEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Bowman v. *Loperena*, 311 U.S. 262	9
Conboy v. *First National Bank*, 203 U.S. 141	9
Department of Banking v. *Pink*, 317 U.S. 264	9
FTC v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206	9
Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655	10

Constitution, statutes and rule:

United States Constitution, Fifth Amendment	4
Economic Stabilization Act of 1970, Section 211(g), 12 U.S.C. 1904 note	7
Emergency Petroleum Allocation Act of 1975, 15 U.S.C. 753 note	3
28 U.S.C. 753 note	3
28 U.S.C. 1651	10
Fed. R. App. P. 42(b)	5

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	10

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1562

CITRONELLE-MOBILE GATHERING, INC., PETITIONER

v.

GULF OIL CORPORATION AND
DEPARTMENT OF ENERGY

No. 78-1724

CITRONELLE-MOBILE GATHERING, INC., PETITIONER

v.

GULF OIL CORPORATION AND
DEPARTMENT OF ENERGY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

1. No. 78-1562.

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 591 F.2d 711. The opinion of the district court (Pet. App. 25a-39a) is reported at 420 F. Supp. 162.

2. No. 78-1724.

The opinion of the court of appeals (Pet. App. 13a-25a) is reported at 578 F.2d 1149. The opinion of the district court (Pet. App. 37a-51a) is reported at 420 F. Supp. 162.

JURISDICTION

1. No. 78-1562.

The judgment of the court of appeals was entered on January 23, 1979. A petition for rehearing was denied on March 13, 1979 (Pet. App. 11a). The petition for a writ of certiorari was filed on April 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754 (a)(1).

2. No. 78-1724.

The judgment of the court of appeals was entered on August 25, 1978. A petition for rehearing was denied on October 20, 1978. A motion "to reopen,

reinstate and decide appeal" was denied on April 20, 1979 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition is jurisdictionally out of time. See pages 8-9, *infra*.

QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals had jurisdiction to review this action (No. 78-1562).

2. Whether the Fifth Circuit was required to reopen a closed case in light of the Temporary Emergency Court's decision (No. 78-1724).

STATEMENT

In August 1975 petitioner contracted to sell to Gulf Oil Corporation crude oil at $13.00 per barrel, with deliveries to begin on September 1. Petitioner delivered oil on September 1, 1975, and Gulf paid $13.00 per barrel for it. Petitioner also delivered oil on September 9 and 29 and on several dates in the following months. On September 29, 1975, the President signed the Emergency Petroleum Allocation Act of 1975 (EPAA), 15 U.S.C. 753 note, which authorized continuation of the federal price regulations on oil that had expired on August 31, 1975. The regulations imposed a ceiling price of $5.40 per barrel, and, as a result, Gulf refused to pay petitioner more than that amount for the deliveries on and after September 9.

Petitioner brought an action against Gulf in the United States District Court for the Southern District of Alabama, claiming that Gulf had breached its contract to pay petitioner $13.00 per barrel of oil delivered. Gulf answered that the price regulations placed a ceiling of $5.40 per barrel on oil, and it counterclaimed for the difference between the amount it had paid at $13.00 per barrel for the September 1 delivery and the amount it would have paid at the $5.40 rate.

The district court permitted the Federal Energy Administration (now the Department of Energy) to intervene as a defendant to defend its regulatory scheme. Following a non-jury trial, the district court entered judgment for Gulf on the complaint and counterclaim (78-1724 Pet. App. 37a-51a), holding that the enactment of September 29, 1975 had reinstated the price controls that had lapsed on August 31 of that year, and that Gulf was "permitted to pay no more than $5.40 per barrel" for the oil purchased from petitioner (*id.* at 50a). The district court refused to certify for decision by the Temporary Emergency Court of Appeals petitioner's contention that the Act unconstitutionally provided for a one-house veto and that, if the regulations were held to apply retroactively to the September deliveries, petitioner would be deprived of its property without due process of law under the Fifth Amendment (*id.* at 47a-48a).

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit

and also filed a notice of appeal to the Temporary Emergency Court of Appeals (TECA). When TECA denied petitioner's motion to postpone consideration of the case pending the outcome of the appeal in the Fifth Circuit, petitioner moved under Fed. R. App. P. 42(b) for voluntary dismissal of its appeal (78-1562 Pet. App. 9a). It stated (emphasis added):

> [Petitioner] is firmly convinced that jurisdiction over this appeal is in the Court of Appeals for the Fifth Circuit and not in [TECA] [citations omitted]. It therefore believes under the circumstances that it is entitled to pursue this litigation in an orderly manner and as in its judgment it best sees fit, *taking cognizance of the risk of an adverse determination by the Fifth Circuit without further recourse to invoke the jurisdiction of this Court.*

On December 7, 1976, TECA granted petitioner's motion and dismissed the appeal (*ibid.*).

Nearly two years later, on August 25, 1978, the Fifth Circuit decided petitioner's appeal (78-1724 Pet. App. 13a-25a). It held that the retroactivity question raised by petitioner in the district court was substantial, and that the case thus raised questions within the jurisdiction of TECA. Thus, it concluded, the district court erred in refusing to certify the question to TECA. It remanded the case to the district court with directions to certify the retroactivity question to TECA.[1]

---

[1] The court of appeals held that it would be "premature" to direct certification of the one-house veto question to TECA,

As directed, the district court certified the retroactivity question to TECA. TECA dismissed the action for want of jurisdiction (78-1562 Pet. App. 1a-10a). The court noted that it had jurisdiction "of all appeals from the district courts of the United States in cases and controversies arising under" the EPAA (*id.* at 6a). Although petitioner's complaint in the district court was for breach of contract, with federal jurisdiction based on diversity of citizenship, TECA held Gulf's defense and counterclaim "arise[] under" the EPAA and are "so closely related to [petitioner's] complaint that the resolution of the litigation in its entirety requires application and interpretation of the EPAA * * *" (*id.* at 8a). Thus, TECA held, all appeals of any sort from the district court's decision, with or without certification, lay to TECA alone, and the Fifth Circuit, in determining that the district court should have certified the case, was asserting "jurisdiction which it did not have" (*ibid.*). Furthermore, TECA concluded, its jurisdiction in the case had "terminated upon [petitioner's] voluntary withdrawal of its appeal, and it does not now have jurisdiction" (*id.* at 9a). Petitioner "knowingly elected to pursue its appeal in the Fifth Circuit Court of Appeals and take the consequences" (*ibid.*; footnote omitted).

---

because once the retroactivity question was certified TECA could direct certification of the remaining issues or decide the certified issue in such a way as to render the remaining questions moot. 78-1724 Pet. App. 24a.

Petitioner then returned to the Fifth Circuit and moved to reinstate its appeal for a decision on the merits. It argued that "[s]ince TECA will not answer the certified question, this Court must now proceed to decide the merits of this controversy" (78-1724 Pet. App. 2a-3a). On April 20, 1979, the Fifth Circuit denied petitioner's motion (*id.* at 1a).

ARGUMENT

In No. 78-1562 petitioner seeks review by certiorari of TECA's decision that, although it once had exclusive jurisdiction to hear the appeal from the district court, it now has none. Petitioner argues that TECA has misinterpreted the well-pleaded complaint rule for determining when a claim arises under a particular federal law. But even if TECA has misunderstood the rule, the fact is that petitioner itself urged TECA to dismiss the certification from the district court. Petitioner has consistently sought to have the Fifth Circuit rather than TECA review the merits of the district court's judgment. Petitioner voluntarily dismissed its appeal to TECA in 1976. In 1978 petitioner again urged TECA to dismiss the action, arguing that the dispute between petitioner and Gulf did not "arise under" the EPAA.[2] 78-1562 Pet. App. 1a-2a & n.1. (Evidently, petitioner hoped

---

[2] Petitioner could have sought review of that question in this Court by maintaining its appeal in TECA and then filing a petition for a writ of certiorari from an adverse decision. See Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

that, if TECA dismissed the action for those reasons, petitioner could return to the Fifth Circuit and urge it to dispose of the appeal on the merits, because that court would then be the only appellate court that had ever had jurisdiction.)

TECA dismissed the action just as petitioner requested. It did so because, it said, the case was within its jurisdiction but that petitioner lost its appeal rights when it voluntarily dismissed its appeal in 1976. But regardless of why TECA dismissed the appeal, it did exactly what petitioner asked it to do: it dismissed the action for want of jurisdiction. Unfortunately for petitioner, it was not able to use this dismissal as a springboard to reinstate the appeal in the Fifth Circuit. Perhaps, if TECA had dismissed the action for the reasons advanced by petitioner, the Fifth Circuit would have been more sympathetic to petitioner's request to reinstate the other appeal. But that is beside the point. It is axiomatic that this Court sits to review judgments, not opinions, and thus, even assuming that petitioner is correct in contending that TECA should have dismissed the action for reasons other than it did, certiorari should be denied. TECA's judgment would be unchanged even if this Court were to agree fully with petitioner's reasoning.

In No. 78-1724 petitioner seeks to review by certiorari or mandamus the Fifth Circuit's refusal, following TECA's decision, to reopen the appeal six months after it disposed of it. The petition is jurisdictionally out of time, having been filed more than 90 days after the court of appeals denied rehearing. Petitioner now seeks to raise the same question that was before the court of appeals on the first disposition of the case: Which court of appeals had appellate jurisdiction? Petitioner could have protected its rights by seeking certiorari from the Fifth Circuit's August 1978 decision, but it did not do so. It is now too late. See *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952); *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267 (1942); *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940); *Conboy* v. *First National Bank*, 203 U.S. 141, 145 (1906).

But even if the motion to reopen the Fifth Circuit case created a new controversy not barred by the expiration of time, only one question could be presented now: Was the denial of the motion proper? The decision whether to reopen an appeal is within the discretion of the court of appeals. Reopenings are rare. Litigation must have an end. The court of appeals did not abuse its discretion here; petitioner's appeals have been pending in one court or another for years. The Fifth Circuit reasonably might have been disappointed that petitioner—despite failing to seek review in this Court of the Fifth Circuit's holding that it lacked jurisdiction—returned to TECA and argued that TECA lacked jurisdiction. The Fifth Circuit also may have been persuaded that TECA is right, or at least that petitioner's voluntary dismissal of its appeal in 1976 should have been an end of its appeals to TECA. But whatever the reason for denying the request to reopen, the Fifth Circuit did not err.

Petitioner's request for mandamus should be denied for three reasons. First, mandamus is not an appropriate way to obtain review of discretionary decisions, and a refusal to reopen a decided case surely is a discretionary decision. *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662 (1978) (plurality opinion). Second, mandamus should not be used as a substitute for appeal, and certainly it should not be used as a means to obtain review of a decision that the Court lacks jurisdiction to review directly. Review by mandamus could not be "in aid of" this Court's jurisdiction when the petition for certiorari is untimely. 28 U.S.C. 1651. Third, mandamus in this Court has been reserved for truly extraordinary cases. See generally R. Stern & E. Gressman, *Supreme Court Practice* 630-639 (5th ed. 1978). There is nothing extraordinary about this case, save perhaps the number of appeals that have been taken and dismissed from a single decision of a district court.

CONCLUSION

The petitions for writs of certiorari should be denied. The motion for leave to file a petition for a writ of mandamus also should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
STEPHANIE LACHMAN GOLDEN
Attorneys

JUNE 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294723 3